No. 21091

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE TURNER,

Plaintiff and Appellant,

vs.

CHARLES H. LUNDQUIST,

Defendant and Appellee.

Appeal From the United States District Court for the the Central District of California.

APPELLEE'S BRIEF.

HURLEY AND DRISCOLL,
By ROBERT W. DRISCOLL,
2540 Huntington Drive,
San Marino, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Rules

Statutes

Textbooks

No. 21091

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE TURNER,

Plaintiff and Appellant,

vs.

CHARLES H. LUNDQUIST,

Defendant and Appellee.

APPELLEE'S BRIEF.

A. Statement of the Pleadings and Facts.

The case at bar against Appellee Lundquist was commenced on May 12, 1964, by the filing in the District Court for the Central District of California of a first Amended Complaint by Appellant Turner.

This is an action for damages for fraud under the Federal Securities Acts. The alleged fraud occurred in connection with appellant Turner's purchase, on January 3, 1961, of certain debentures issued by United States Chemical Milling Corporation (USCM). Turner originally sued Roland, the Treasurer of USCM, on April 19, 1963. Later, on May 12, 1964, he filed a First Amended Complaint [Tr. 2]* naming, for the first time, appellee Lundquist, the President of USCM, as a defendant. Lundquist and Roland had both been

*References to transcript of record on appeal are cited "Tr." followed by the page number.

officers and directors of USCM on January 3, 1961. Both the original complaint (against Roland) and the first amended complaint (against Roland and Lundquist) alleged essentially the same facts, except the original complaint made no mention of Lundquist, nor did it allege that anyone acted jointly with Roland. The first amended complaint was framed in three causes of action.

The first cause of action sets forth certain representations alleged to constitute a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule X-10B-5 of the Rules and Regulations of the Securities and Exchange Commission which induced Turner to purchase $100,000.00 of debentures of USCM.

Moreover, Turner alleged that defendants omitted to inform Turner of certain material facts. Turner alleged (para. XV of the first amended complaint) that if he had known of said facts, or any of them, he "would not have purchased said debentures."

The second cause of action incorporates the same facts, and alleges a violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C.A. Section 77q.

The third cause of action apparently alleges an action for fraud and deceit at common law.

Jurisdiction of the District Court over the first cause of action is based on Section 27 of the Securities Act of 1934, 15 U.S.C.A. Section 78aa.

The District Court's jurisdiction over the second cause of action is based on Section 22(a) of the Securities Act of 1933, 15 U.S.C.A., Section 77v.

The first amended complaint does not state the basis for the District Court's jurisdiction over the third cause

of action, nor does Appellant's Opening Brief disclose any specific basis for jurisdiction. Presumably, jurisdiction as to the third cause of action rests upon the doctrine of pendent jurisdiction.

It is contended that this court has jurisdiction to review the judgment in question by reason of Rule 73(a) of the Federal Rules of Civil Procedure.

Defendant Lundquist's answer [Tr. 11] in addition to containing detailed denials, sets up several affirmative defenses, including the one-year Statute of Limitations under 15 U.S.C.A. 77n and 78r, laches, failure to bring the action within the time within a reasonable time after the facts alleged were discovered or should have been discovered, and the defense that the action was barred by the applicable State laws establishing limitations of action, citing California Code of Civil Procedure, Section 338, subsection 4 (action for relief on ground of fraud—3 years).

Before filing his answer, Lundquist filed a Motion to Dismiss and a Motion for Summary Judgment [Tr. 243] urging that the first amended complaint failed to state a claim against Lundquist upon which relief can be granted, and urging that summary judgment should be granted because the claims against Lundquist are barred by all applicable Statutes of Limitations. This same motion sought to disqualify plaintiff's original attorneys on the grounds that such representation was unethical and unconscionable. This latter motion was granted by the Honorable Gus J. Solomon, but the motion to dismiss and motion for summary judgment were not ruled on at that time.

Later, in Jnue 1965, when the motion to dismiss and motion for summary judgment were renewed, the

same were denied by Judge Solomon, who concluded that although the three year statute of limitations applied, there were several reasons for denying the motion to dismiss, and in a Memorandum Opinion [Tr. 268] dated June 9, 1965, stated:

> "Defendant Lundquist's motion for summary judgment reasserts some of the matters set forth in his motion to dismiss and, in addition thereto, asserts matters which may be contradicted. A motion for summary judgment should never be granted where a claim for relief has been defectively stated. It must appear that no claim for relief can exist. I do not find such a situation here.
>
> "Each of defendant Lundquist's motions is therefore denied."

Judge Solomon then added these significant and prophetic words:

> *"It may be that after a pretrial order is filed, the facts admitted in such order will make the controversy ripe for decision on a motion for summary judgment. In that event, the defendant Lundquist will be given the opportunity to file such a motion."* (Italics added).

Thereafter, a pre-trial conference order was filed February 21, 1966 [Tr. 271].

On March 4, 1966, defendant Lundquist again filed a Motion for Summary Judgment [Tr. 309] which was also a Motion to Dismiss for failure to state a claim and to dismiss the action and each cause of action because barred by the Statute of Limitations.

The Motion for Summary Judgment was based on the same affidavits of Charles H. Lundquist [Tr. 34

and 174] previously filed in connection with the earlier motions denied by Judge Solomon without prejudice.

No pleadings, affidavits or other evidence was filed or introduced by Turner contradicting Lundquist's affidavits to the effect that Turner waited more than three years and four months after purchasing the debentures before suing Lundquist for the alleged fraud. No excuse or avoidance of the Statute of Limitations was pleaded or raised, by affidavit or otherwise, despite Judge Solomon's invitation to do so, *supra*. In fact, the affidavit of James D. Harris, plaintiff's previous counsel, shows that plaintiff knew the facts on which the first amended complaint was based before he ever contacted Harris [Tr. 96] and that "*All* of the evidence and information upon which the first amended complaint is based derives from transactions and events occurring *prior to January 3, 1961*." (Emphasis supplied). As of the date the renewed Motions [Tr. 309] for Summary Judgment and Dismissal came on for hearing, the first amended complaint showed clearly on its face that the action was barred by the three-year statute of limitations as to the first and third causes of action, and by the one-year statute of limitations as to the second cause of action. No second amended complaint was ever filed, nor were any amendments proposed which would show waiver, extension or excuse of the statute of limitations.

Accordingly, the Honorable Harry Westover granted both the Motion to Dismiss and the Motion for Summary Judgment [Tr. 327], from which Turner has appealed to this Court.

B. Statement of the Case.

Appellant's purported "Statement of the Pleadings and Facts" and "Statement of the Case" in the early portions of his brief are so twisted, confused, and mixed with rank hearsay, conjecture and argument as to be totally misleading and irresponsible. Appellee, who controverts said statements, will therefore set forth the *facts* in this case, as they appear from the *record,* without reference to hearsay or opinion, and without reference to other lawsuits between other litigants about different issues.

Taking as factually correct, for purposes of this appeal, the allegations of plaintiff-appellant Turner set forth in the first amended complaint [Tr. 2], the material portions thereof are as follows:

A close and confidential relationship existed between Turner and Glen R. Roland, who was a director and secretary-treasurer of USCM. (No such relationship between Turner and Lundquist is alleged). As a result of this confidential relationship, defendants Lundquist and Roland were able to induce and solicit Turner between September 1, 1960, and January 3, 1961, to buy debentures from USCM. Defendant Roland, in soliciting Turner to buy said debentures, made seven (7) representations "with the knowledge, consent and assistance of defendant Lundquist". These representations were that:

(1) USCM "was in sound financial condition",

(2) The offered debentures were "a sound, secure investment,"

(3) The debentures were being offered to "sophisticated investors who were purchasing for purposes of long-range investment",

(4) The purchasers were "acquiring said debentures for investment, with no present intention of converting and selling the shares",

(5) The issue would be oversubscribed,

(6) The debentures were exempt from registration under the Securities Act of 1933, and

(7) Financial statements of USCM "which were shown to plaintiff represented truly and fairly the condition of the business and affairs of said corporation."

Turner believed the representations, and on or about January 3, 1961, purchased the debentures and paid therefor $100,000.00, in reliance on said representations. These representations were false and untrue, and defendants knew at the time, or reasonably should have known they were false. In addition to the above affirmative representations, defendants, and each of them on or prior to January 3, 1961, omitted to state or to inform plaintiff of eight (8) material facts. These were that:

(1) Roland was a creditor of USCM,

(2) Defendants stood to benefit from the sale of the debentures,

(3) USCM's financial condition had worsened,

(4) USCM "had suffered drastically changed business conditions and the curtailment of a major military program",

(5) The financial statements issued for the fiscal year ending January 31, 1961, would show greater losses than previously disclosed,

(6) Certain debenture purchasers intended to immediately convert their debentures into common stock,

(7) And sell the stock, and

(8) Roland had invested in, or intended to invest in, a subsidiary of USCM to the detriment of USCM.

Turner further alleges that defendants knew or should have known of these eight (8) omitted facts, but nevertheless failed to disclose them, in order to induce Turner to buy the debentures. Turner didn't know these facts. "If plaintiff had known of such, or any of them," Turner alleges, he "would not have purchased said debentures." Since the debentures are unpaid, and USCM is insolvent and unable to pay them, Turner has been damaged in the amount of the purchase. Adequate allegations of use of mails and interstate commerce are pleaded.

In his original affidavit [Tr. 34] supporting the Motion to Dismiss and for Summary Judgment, Lundquist stated that Turner was, between September, 1960, and January 3, 1961, advised of USCM's continuing losses and the cancellation of the B-70 program and its adverse effect on USCM; that any matters in the first amended complaint which are true were known to plaintiff Turner on or before April 30, 1961, more than three years before the first amended complaint was filed.

In a supplemental affidavit filed September 28, 1964 [Tr. 174], made by Lundquist on personal knowledge, more detailed facts were set forth showing Turner's knowledge of the grave condition of USCM, and at-

tached thereto were Exhibits I through XVII, inclusive. [Tr. 187-242, inclusive].

Lundquist, who was a director of USCM and, until March 16, 1961, its President, also was one of the 15 persons (including Turner) who purchased the debentures of USCM. The Agreement of December 1, 1960 [Tr. 187-188] shows that Lundquist agreed to buy $420,000.00 of the debentures, and Turner agreed to buy $125,000.00, rather than the $100,000.00 alleged in the First Amended Complaint. Turner (as did the other purchasers) agreed to purchase on condition that he received from USCM's counsel a favorable opinion, satisfactory to Turner and his counsel, as to the exemption of the issue from the Securities Act of 1933. [Tr. 189]. Each debenture purchaser was given the right at his option to convert, in whole or in part, his debentures into USCM common stock at $12.00 per share [Tr. 190]. The debentures were expressly made subordinate to "Senior Indebtedness" then or thereafter incurred, which by definition included practically all types of debt except regular accounts payable [Tr. 196]. USCM represented and warranted [Tr. 198], among other things, that "the financial statements, including the balance sheet and income statement as at and to September 30, 1960, and all notes thereto, which were heretofore delivered" to Turner, "present fairly the consolidated financial condition of the company and its subsidiaries at September 30, 1960, and the results of operations", and in Paragraph 9(C) stated:

> "(C) There have been no material adverse changes in the consolidated financial condition of the Company and its subsidiaries, financial or otherwise, since the date as of which the condition of

such corporations is set forth in the financial statements referred to in subparagraph (b) above, *other than as referred to in the accompanying letter of even date herewith, receipt of which you hereby acknowledge.*" (Emphasis added).

The accompanying letter to Turner, dated December 1, 1960 [Tr. 206], states, among other things:

"A net loss of $552,932 on sales of $3,504,504 for the six months ended July 31, 1960 was reported through the financial press following the letter to shareholders, dated August 17, 1960.

"To date, the Company has not returned to profitable operations *and a substantial year-end loss is indicated.*" (Emphasis added).

The August 17, 1960, letter [Tr. 208] which was also sent to Turner, showed first half losses due to defense cutbacks and anticipated profits for the second half, which expectation was not borne out, as shown by the December 1, 1960, letter [Tr. 206].

The September 30, 1960, Consolidated Balance Sheet [Tr. 209], which was also furnished to Turner prior to his debenture purchase, showed that $664,005 of the Subordinated Convertible Notes would be converted into capital stock. The notes to this financial statement [Tr. 211] contained the following passage:

"3. The following transactions are included in the pro-forma statement:

* * *

"B. The proposed sale of $1,664,005.00 of the Company's 6% 10-year subordinated convertible notes — $1,000,000.00 for cash and $664,005.00 in cancellation of existing debt. The pro-forma state-

ment shows the effect of the conversion of the Subordinated Convertible Notes issued in cancellation of indebtedness ($664,005.00) into $55,333 shares of $1.00 per common stock at $12.00 per share *pursuant to an agreement to convert them into common stock prior to 1/13/61.*" (Emphasis added.)

This same Financial Statement [Tr. 210] showed a net loss for the eight months ended September 30, 1960, of $996,187, which was $443,255 greater than the net loss shown for the period ended July 31, 1960, only two months earlier. All of this adverse financial data was furnished to Turner before he purchased the debentures.

On January 30, 1961, which was 27 days after Turner purchased his debentures, Turner was notified by letter [Tr. 223] that $664,005 of the debentures had been converted into stock.

On April 25, 1961 [Tr. 225] Turner was furnished a Consolidated Balance Sheet and Statement of Income and Retained Earnings as at January 31, 1961 [Tr. 226-232], and a copy of a letter to shareholders dated April 18, 1961 [Tr. 233]. The Statement of Income and Retained Earnings showed a loss for the year of $2,489,583, and the April 18, 1961, letter explained that approximately $1,600,000 of this loss was comprised of non-recurring costs. The letter stated:

> "Unfavorable business conditions that prevailed in the aircraft industry, *including the curtailment of a major military program* which necessitated realignment of the Company's manufacturing facilities, were largely responsible for the adverse earnings. . . ." (Emphasis added).

On or about January 3, 1961, coincidental with the purchase of the debentures, Turner received a legal opinion from the Los Angeles law firm of O'Melveny & Myers dated January 3, 1961 [Tr. 217, 218], which pointed out, among other things, that the debenture issue was considered exempt from registration under the Securities Act of 1933 because of the express representations of the purchasers, including Turner, set forth in the December 1, 1960 Agreement [Tr. 200]. The pertinent provisions of this representation were as follows:

> "10. *Representations of the Purchasers.* Each of you, severally and not jointly, represents and warrants, and in making this sale to you it is specifically understood and agreed, that the Notes being acquired by you are being acquired and will be taken and received for your private personal investment for your own account with no intention of reselling or otherwise distributing the Notes and that the shares of Common Stock which you may acquire upon conversion of the Notes or any part thereof will also be acquired by you for your private personal investment for your own account with no intention of reselling or otherwise distributing such shares. You fully comprehend that the Company is relying to a material degree on your representations and warranties contained herein. . . ."

Notwithstanding the investment intent warranty, plaintiff Joe Turner secretly bought $25,000 of his total $125,000 debenture purchase for the account of Glen R. Roland, and later turned over $25,000 in debentures to Roland. On January 29, 1964, at a deposition of Tur-

ner taken by defendant Glen R. Roland's attorney (James White, Esq.), Turner testified under oath that he bought $125,000 of convertible debentures of USCM and that there was an oral agreement between Turner and Roland that Roland (whose nickname was "G.R.") would take $25,000 of them, which agreement was made in the fall of 1960 before the debentures were purchased [Tr. 182, 185]. At said deposition, Turner also testified about the financial advice and investigation he had received from his banker, Mr. Dolph Montgomery, and of other incidents relating to his debenture purchase, as follows:

> "Q. By Mr. White: Before you purchased the debentures in January of 1961, what assistance if any, did you obtain from financial counselors or financial counselor to help you decide whether or not to go into the venture? A. I had my partner, Dolph Montgomery, come out here in the Fall of 1960; I believe probably October or November." [p. 16, lines 15-21]
>
> "Q. In what enterprise or enterprises is or was then Mr. Montgomery your partner? A. He was the President of the City National Bank in Lawton.
>
> Mr. Oeting: (Turner's former attorney) The question was, Mr. Turner, in what enterprise was he your partner.
>
> The Witness: Oh, excuse me. He was a partner in the theater operating company in Lawton.
>
> Q. By Mr. White: Was it your intention that Mr. Dolph Montgomery would take a part of the subordinated convertible debentures? In other words, was he going to be a co-investor with you?

A. No. I don't think so. He had a right to take a look at it, but his purpose was to come out here and check the investment, if it looked good, to loan me the money and loan Roland the money." [p. 17, lines 3-18].

"Q. Would it be a correct statement, sir, to say that Mr. Dolph Montgomery came out her to advise you as a partner, as a friend and as a banker who was going to put up the cash for this transaction? A. Yes.

Q. What information, to your knowledge, was given to Mr. Montgomery when he came out to look into the investment and these convertible debentures? A. He was given the annual financial statement for 1960 that was published in 1960 and then a statement, I believe, as of September, 1960.

Q. All right. Did he go out to the physical plant? A. Yes. We went out there and walked through the physical plant and went to lunch with Mr. Roland." [p. 18, lines 1-15].

"Q. The financial information which was given to you and to Mr. Dolph Montgomery indicated that the company had suffered some rather heavy losses, didn't it? A. Yes.

Q. Can you now recall what kind of losses were involved in accordance with the information that was supplied to you? A. No, I don't.

Q. Did you discuss the matter of the company losses with Mr. Roland? A. Oh, I am sure I did.

Q. When? A. Prior to buying the debentures." [p. 19, line 17, to p. 20, line 3].

"Q. At any time before purchasing the debentures did you discuss the matter with U. S. Chemical Milling with your broker? A. It's possible.

Q. In any such discussion, did you learn of the problems that were besetting the company? A. I am sure that he would have had the same information that I had on the September statement if I talked to him about it. I probably did." [p. 20, line 19, to p. 21, line 1].

"Q. By Mr. White: On Defendant's A (referring to Exh. IV annexed to Lundquist's supplemental affidavit) there is a document called 'Notes to Financial Statement for Period Ended September 30, 1960.'

Paragraph 3B. That talks about this issue of the subordinated convertible notes, does it not, sir? A. Yes.

Q. Did you ask Mr. Willoughby whether or not his conversions came under the terms of that subparagraph, sir? A. No, in fact, I didn't pay any attention to the subparagraph or I would never have complained about it in the first place, would I? I didn't even know that there was anything about converting part of the indebtedness in that thing. I didn't read it.

Q. Mr. Montgomery read it, didn't he? A. Yes." [p. 46, lines 3-18].

"Q. To your present knowledge, immediately prior to the issuance of the debentures, had the position at USCM become materially worse than it had been, say, throughout the prior years? A. No, and I would be sure of this because I was already getting edgy. I found that I was out there

all by myself in this investment and I didn't even have a—we started out to buy a large block of stock and GR was going to go for half of it, and the way it wound up, here I was by myself in the whole thing and I was a little touchy about it, but GR and I spent the Christmas holidays together up at Tahoe. He had rented a cabin up there and we went up there with our wives and the families over the holidays, and that would have been immediately in front of the time for making the investment, and if he had said one word to me about getting out, I think I would have run even then. It wasn't stacking up good. My wife was getting a little bit irritated about it.

Q. You mean this is before you bought it? A. Yes, before the die was cast. I had signed the agreement the first of December.

Q. But you hadn't paid anything in? A. I hadn't put my money in. I could still holler uncle.

Q. You were getting a little nervous. What was it that was making you nervous at the time? A. Well, the fact that we had started out with grand and glorious hopes of making this investment together and going on the notes together and everything, and my way of doing business has always been, if I told you today that I was going to take 25,000 of something you had, tomorrow morning I would be down here with my financial statement and a note and give it to you. You wouldn't

ever have to ask me again about it, and here it was —GR had agreed to take 25,000 of this $125,000 but he didn't ever mention it again, and here we were up there in Tahoe and this kind of irritated me. I, let's say, was irritated with GR. In fact, I was getting so irritated with him that I left early. I insisted that we pack up and get out of there. My wife was getting mad about it, too." [p. 64, line 13, to p. 65, line 26].

"Q. In '61. I see. Did you know that USCM had had a position in the B-70 program? A. Yes.

Q. When did you know about that? A. Oh, I knew that before we ever went into this thing. That was one of the big points in the debenture program." [p. 67, line 24, to p. 68, line 4].

"Q. You have mentioned that there was not any correspondence between yourself and Mr. Roland respecting the debentures. Was there any between yourself and USCM? A. No, nothing other than whatever they sent me in the mail, like those reports and agreements and so forth." [p. 80, lines 7-12].

On May 12, 1964, which was three years, four months and nine days after his purchase of the debentures, Turner commenced his action against Lundquist, by filing the first amended complaint.

C. The Questions Presented.

The basic question presented is whether the matters disclosed to Turner at any time before May 12, 1961, were sufficient to put a reasonably prudent man on notice, so as to start the Statute of Limitations applicable to fraud running.

Subsidiary questions presented are:

(1) Can, and should, this Court consider the "affidavit" of Attorney Levin, who has no first-hand knowledge of any fact, and whose affidavit does not meet any of the requirements of evidence?

(2) Does the first amended complaint, on its face, show that the Statute of Limitations expired before it was filed?

(3) Did the denial, without prejudice, by Judge Solomon of the earlier motions to dismiss and for summary judgment prevent those motions from later being raised?

(4) Can a plaintiff, after filing a lawsuit based upon fraud, and after later joining a co-defendant for the same fraud, re-open a case barred by the Statute of Limitations by discovering more "facts" on which his original cause of action was based?

ARGUMENT.

I.

The Matters Disclosed to Turner More Than Three Years Before His Bringing Suit Against Lundquist Were Sufficient to Put a Reasonable Prudent Man on Notice, so as to Start the Running of the Three-Year Statute of Limitations Applicable to Fraud.

The alleged fraud occurred in California. Since the Securities Exchange Act of 1934 provides no statute of limitations, the three-year California Statute of Limitations applicable to fraud actions applies in this case. This is the finding of Judge Solomon [Tr. 269] and is the rule laid down in *Fratt v. Robinson,* 203 F. 2d 627, at 634.

Section 338(4) of the California Code of Civil Procedure states that the limitation period is three years in:

"* * *

"(4) An action for relief on the ground of fraud or mistake. The cause of action in such case is not to be deemed to have accrued until the discovery, but the aggrieved party, of the facts constituting the fraud or mistake."

Here, the undisputed record is bristling with facts showing clearly that all the matters Turner complains of were either (1) disclosed to him by express written documentation before the transaction was consummated or (2) brought to his attention more than three years before he sued Lundquist.

The rule in California is that in actions for relief on the ground of fraud, the Statute of Limitations

The following appears in *Wood v. Carpenter,* 101 U. S. 135, 140 [25 L. Ed. 807]:

> "In this class of cases the plaintiff is held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made'. . . . A general allegation of ignorance at one time and of knowledge at another [is] of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. . . . A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. . . . There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself. *The circumstances of the discovery must be fully stated and proved,* and the delay which has occurred must be shown to be consistent with the requisite diligence."

The foregoing is quoted with approval in *Phelps v. Grady,* 168 Cal. 73 [141 Pac. 926]. Other cases recognizing the above principles are: *Original M. & M. Co. v. Casad,* 210 Cal. 71, 74, 75 [290 Pac. 456]; *Newport v. Hatton,* 195 Cal. 132, 146 [231 Pac. 987]; *Victor Oil Co. v. Drum,* 184 Cal. 226, 239-242 [193 Pac. 243]; *Nichlos v. Moore,* 181 Cal. 131, 132 [183 Pac.

531]; *Galusha v. Fraser,* 178 Cal. 653, 657 [174 Pac. 311].

The case last above cited clearly and concisely states the law. It is there declared:

> "Where the plaintiff sues for relief on the ground of fraud and seeks exemption from the three years period of limitation for the reason that he did not discover the fraud until after it was perpetrated, he must not only show [1] that he did not discover the fraud until within the three years next before the action was begun and [2] that the fraud was committed under such circumstances that he would not be presumed t have had knowledge of it at the time, but [3] *he must also set forth the times and circumstances under which the facts constituting the fraud came to his knowledge so that the court may determine from the allegations of the complaint whether the discovery was within that period.*"

Tested by the rules set down in the cited cases, the first amended complaint in the case at bar is deficient and the trial court therefore properly granted appellee's motions. Clearly, the first amended complaint does not satisfy the first two requirements above enumerated in that it nowhere alleges that the fraud was *discovered* within three years of the commencement of suit nor that it was committed under such circumstances as to preclude any presumption of knowledge on plaintiff's part at the time of its commission. Moreover, as already indicated, the cases recognize and declare the existence of a third essential to a valid and proper pleading in a case of this character, viz., an

allegation as to the circumstances surrounding the discovery of the fraud complained of. Such an allegation is necessary in order that the trial court might readily determine whether or not the facts and circumstances leading to the discovery of the fraud existed for more than three years prior to the commencement of suit. It is well settled, of course, that the means of knowledge are the equivalent of knowledge. (*Victor Oil Co. v. Drum, supra; Lady Washington C. Co. v. Wood, supra; Bancroft v. Woodward,* 183 Cal. 99, 108 [190 Pac. 445].) As stated in the case last above cited, "where a party has knowledge of facts of a character which would reasonably put him upon inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud or other ground for rescission, he will be charged with having discovered the fraud or other ground as of the time he should have discovered it, that is, as of the time when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so."

In the instant case no allegation touching these three requirements is raised. For all that appears on the face of the first amended complaint, the facts leading to the inquiry and investigation which uncovered the fraud may have been available to the plaintiff for more than three years prior to the institution of this action. It was incumbent upon plaintiff to allege the circumstances of the discovery in order that the trial court might determine whether or not the information prompting and leading to the investigation was available to plaintiff for more than three years prior to the institution of this action. The complaint here utterly fails to allege any facts showing why such investigation was

not made at an earlier date and, if sooner made, why it would not have disclosed the fraud prior to the running of the period of limitations. True, the complaint alleges the secretive character of the fraud and conspiracy but it was for the plaintiff to show why it could not have been discovered earlier. Any other conclusion would permit a defrauded party, having at all times the means of knowledge at his disposal, to complain of such fraud long after the running of the period of limitations by the simple expedient of alleging that an investigation within three years of the commencement of suit uncovered the fraud. This would place a premium on dilatory tactics and would relieve a party to exercising that diligence required by the law.

Consolidated R & P Co. v. Scarborough, 216 Cal. 698, 704-705.

The affidavit of James Harris [Tr. 97 at lines 3-6 thereof] makes it clear that all allegedly fraudulent acts were admittedly committed prior to January 3, 1961. Therefore, the sole issue is whether at that time there had been discovery by plaintiff of the facts constituting the fraud. *Teitelbaum v. Borders,* 206 Cal. App. 2d 634, 638, 23 Cal. Rptr. 868.

This does not require that the aggrieved party know the exact manner in which his injury was effected, nor the identities of all parties who may have played a role therein. (*Bainbridge v. Stoner,* 16 Cal.2d 423, 430 [106 P. 2d 423]; cf. *Staples v. Zoph,* 9 Cal. App. 2d 369, 370 [49 P.2d 1131].)

In *Bainbridge v. Stoner, supra,* at page 430, the court stated:

> "Under ordinary circumstances, a plaintiff may not invoke the aid of a court of equity for relief

against fraud after the expiration of the period of limitation for such an action unless he affirmatively pleads that he did not discover the facts constituting the fraud until within three years prior to the date he filed his complaint. (Sec. 338, Code Civ. Proc.) The word discovery as used in the statute is not synonymous with knowledge. And the court must determine, as a matter of law, when, under the facts pleaded, there was a discovery by the plaintiff, in the legal sense of that term. Consequently, an averment of lack of knowledge within the statutory period is not sufficient; a plaintiff must also show that he had no means of knowledge or notice which followed by inquiry would have shown the circumstances upon which the cause of action is founded. Moreover, he must also show when and how the facts concerning the fraud became known to him. [Citations.]"

No facts are alleged in the first amended complaint to the effect that appellee Lundquist bore a confidential relationship to Turner. Only Roland is alleged to have stood in such a relationship to Turner. (Roland has since been dismissed from this action.) Lundquist alone is the only defendant.

This lack of an alleged confidential relation between the remaining parties to this law suit is important for two reasons. First, appellant is unable to avail himself of any relaxation of the Statute of Limitations in cases involving confidential relationships. Secondly, the fraudulent concealment necessary to delay the running of the Statute must be that of the defendant (Lundquist). This latter point is clearly spelled out in *Coombes*

v. Getz, 217 Cal. 320 at 335-336 where the Court stated:

> "The rule that an action brought for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud applies only when the fraud, which is the basis of the action, is the fraud of the defendant in the case. It has no application when the fraud charged is that of a third party. This distinction is clearly set forth in a decision rendered by the Circuit Court of Appeals in the case of *Hayden v. Thompson,* 71 Fed. 60, 70, as follows: 'The reason of the rule that the time limited by the statute for the commencement of an action for fraud shall not commence to run while the defendant conceals it is that he ought not to be permitted to take advantage of his own wrong. Neither the reason nor the rule has any application to a cause of action which is fraudulently concealed from the parties in interest by third persons. *The fraudulent concealment of the defendant alone will delay the running of the statute. (Pratt v. Northam, 5* Mason 95, 112, Fed. Cas. No. 11,376; *Simmons v. Baynard,* 30 Fed. 532; *Stevenson v. Robinson,* 39 Mich. 160.)' "

The three-year limitation applies to all fraud actions whether the relief demanded be legal or equitable.

Knapp v. Knapp, 15 Cal. 2d 237, 242 [100 P.2d 759];

Douglas v. Douglas, 103 Cal. App. 2d 29, 32, 228 P.2d 603.

A motion for summary judgment is a suitable method for testing whether the claim is barred by the Stat-

ute of Limitations. This procedure is useful for avoiding the expense and delay of an unnecessary trial if there is no dispute as to the facts governing this defense and the claim is barred as a matter of law.

> 3 *Barron & Holtzoff,* Fed. Practice & Proc., Rules Edition, Section 1245, p. 206.

> "If the record presented on motion for summary judgment shows that plaintiff cannot successfully refute defendant's plea of limitations, the motion should be granted. If the defendant shows that the applicable period of limitations has elapsed, summary judgment should not be denied on the chance that there might possibly be facts which would toll the Statute of Limitations. In such a case, the plaintiff must show by affidavits, or otherwise, facts which toll the statute." 3 *Barron & Holtzoff, supra.*, p. 207.

Where the record discloses that the plaintiff cannot successfuly refute the defendant's plea of the Statute of Limitations, the plaintiff's cause of action is barred and the defendant is entitled to a judgment as a matter of law.

> *Baker v. Sisk,* 1 FRD 232, 237 (D.C. Okla.) (1938).

California courts have also favored the summary judgment procedure as a method of disposing of claims which are barred by limitations.

The California procedural rule is set forth in California Code of Civil Procedure, Section 437, which provides that a defendant's motion for summary judgment must be supported by affidavits containing facts sufficient to entitle the defendant to judgment. Upon

such a showing the complaint may be dismissed unless the plaintiff, by affidavit, shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact.

Where the affidavits of the moving party are on their face sufficient, and the opposing party fails to come forward with counter-affidavits to show that his case has merit, the motion should be granted.

Helfer v. Hubert, 208 Cal. App. 2d 22, 25, 24 Cal. Rptr. 900;

Craig v. Earl, 194 Cal. App. 2d 652, 655, 15 Cal. Rptr. 207.

In the *Helfer* case, *supra,* at 208 Cal. App. 2d, pages 25-27, sets forth a recent summation by a California court of the applicable rules governing summary judgments on the ground of limitations, where the court states:

> "Where the affidavits of the moving party are on their face sufficient, and the opposing party fails to come forward with counteraffidavits to show that his case has merit, the motion should be granted. (*Craig v. Earl,* 194 Cal.App.2d 652 [15 Cal.Rptr. 207]; *Newport v. City of Los Angeles,* 184 Cal.App.2d 229 [7 Cal.Rptr. 497]; *Nini v. Culberg,* 183 Cal.App.2d 657 [7 Cal.Rptr. 146]; *Estate of Kelly,* 178 Cal.App.2d 24 [2 Cal.Rptr. 634]; *Kelly v. Liddicoat,* 35 Cal.App.2d 559 [96 P.2d 186].)
>
> "It is not enough that the complaint alleges sufficient facts. The value of the motion for summary judgment is that it may be used, under the limitations set forth above, to distinguish between

a case raising a genuine issue of fact and one supported only by adept pleading. (See *Coyne v. Krempels,* 36 Cal.2d 257, 262 [223 P.2d 244]; *Hicks v. Bridges,* 152 Cal.App.2d 146, 148 [313 P.2d 15]; *Atchison v. McGee,* 141 Cal.App.2d 515 [296 P.2d 860]; *Schessler v. Keck,* 138 Cal.App. 2d 663, 668 [292 P.2d 314]; *Cone v. Union Oil Co.,* 129 Cal.App.2d 558, 562 [277 P.2d 464].)

"An action for relief on the ground of fraud must be brought within three years, but the cause of action is 'not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud.' (Code Civ. Proc., §338, subd. 4.)

"The rules governing the application of this statute are summarized in *Hobart v. Hobart Estate Co.,* 26 Cal.2d 412 at p. 437 [159 P.2d 958], as follows:

'The provision tolling operation of the statute until discovery of the fraud has long been treated as an exception and, accordingly, this court has held that if an action is brought more than three years after commission of the fraud, plaintiff has the burden of pleading and proving that he did not make the discovery until within three years prior to the filing of his complaint. [Citations.] Further, although negligence by the person defrauded is not a defense to a promptly brought action based upon intentional misrepresentation [citation], the cases construing section 338, subdivision 4, *supra,* have held that plaintiff must affirmatively excuse his failure to discover the fraud within three years after it took place, by establishing facts showing that he was not negligent in failing to make the

discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. . . .

'It is not in every case, however, that a person is barred after three years by failure to pursue an available means of discovering possible fraud. The statute commences to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. Section 19 of the Civil Code provides: "Every person who has actual notice of circumstances *sufficient to put a prudent man upon inquiry* as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." (Italics added.)'

"When the facts known to the plaintiff are susceptible to opposing inferences, the question of whether he has notice of 'circumstances sufficient to put a prudent man upon inquiry' is a question of fact. (*Hobart v. Hobart Estate Co., supra,* at p. 440; *Ramey v. General Petroleum Corp.,* 173 Cal.App.2d 386, 400 [343 P.2d 787]; *Sime v. Malouf,* 95 Cal.App.2d 82, 104 [212 P.2d 946, 213 P.2d 788].) On the other hand, when knowledge had by or imputed to plaintiff is such as to compel the conclusion that a prudent man would have suspected the fraud, the court may determine as a matter of law that there had been 'discovery.' (*Bainbridge v. Stoner,* 16 Cal.2d 423, 430 [106 P.2d 423]; *Lady Washington Consol. Co. v. Wood,* 113 Cal. 482, 486 [45 P. 809]; *Haley v. Santa Fe Land Imp. Co.,* 5 Cal.App.2d 415 [42 P.2d 1078].)"

Applying the foregoing legal principles to the facts in the instant case, it can be seen that matters were brought to Turner's attention both by letters addressed to him which he received, and by meetings and discussions with Roland and others, which should have put a reasonably prudent man on notice that the alleged misrepresentations of which Turner complains were, at best, misunderstandings by Turner because of his failure or refusal or neglect to read the various documents furnished to him as a part of the transaction. Moreover, the alleged omissions to state or inform Turner of materials facts simply evaporate upon examination of the facts, since all of the matters which Turner claims were not disclosed to him were in fact disclosed to him well in advance of the closing of the debenture issue on January 3, 1961, and certainly became known to him upon distribution of the financial statement in April, 1961, more than three years before he sued Lundquist.

Taking as true Turner's allegations that there were seven misrepresentations, the true facts relating to each of these seven misrepresentations became known to him or should have become known to him no later than April, 1961, when the financial statements for USCM for the fiscal year ended January 31, 1961, were distributed to Turner, which financial statements showed a substantial year-end loss [Tr. 233].

Clearly, Turner should have pursued his claim against Lundquist, if in fact he had a claim, long before the date he initiated his action against Lundquist on May 12, 1964. Since the Statute of Limitations is favored by the law (*West v. Cincinnatti N.O. & T.P. Railway Co.,* 108 F. Supp. 276 D.C. Tenn. 1953) and

since periods of limitation are established to cut off rights, justifiable or not, that might otherwise be asserted, such periods of limitation must be strictly adhered to by the judiciary.

> *Olin Mathieson Chemical Corp. v. U.S.,* 265 F. 2d 293 (C.A. Ill. 1959).

Here, as both sides admit, the issuer of the debentures, USCM, has since gone bankrupt, a fact from which the court can infer that company personnel have scattered, records have become lost, and memories have faded. To proceed to trial in this case, and attempt to resurrect stale evidence through testimony of accountants and others to disprove the contentions alleged by Turner would undoubtedly place the defendant Lundquist in a position of extreme hardship. It is for this very reason that statutes of limitations have been enacted by the Legislatures.

Statutes of Limitations are statutes of repose and are intended to prevent revival and enforcement of stale demands against which it may be difficult to defend, because of lapse of time, fading of memory, and possible loss of documents.

> *Munter v. Lankford,* 127 F. Supp. 630, aff'd. 232 F. 2d 373, 98 U.S. App. D.C. 116.

Statutes of Limitations are, in their conclusive effects, designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared.

> *Rothensies v. Electric Storage Battery Co.,* 329 U.S. 296 at pp. 301 and 302, 67 S.Ct. 271, at p. 273, 91 L. Ed. 296.

With respect to the fairness of Statutes of Limitations, the Supreme Court in the *Rothensies* case, *supra,* continues as follows, 329 U.S. at page 301, 67 S. Ct. at page 273:

> "* * *
>
> "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute."

Accordingly, the judgment of the lower court granting the motion to dismiss and granting the motion for summary judgment should be affirmed.

II.

The "Affidavit" of Attorney Richard H. Levin in Opposition to the Motion for Summary Judgment Is Deficient.

Rule 56(e) of the Federal Rules of Civil Procedure States:

> "(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY. Supporting and opposing affidavits shall be made *on personal knowledge,* shall set forth such facts as would be *admissible in evidence,* and shall show affirmatively that the *affiant is competent* to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions or by further affidavits." (Italics added.)

In opposition to appellee's motion for summary judgment, attorney Richard H. Levin filed and served a "Declaration" which was notarized and therefore presumably constitutes an affidavit [Tr. 316-19]. Rule 56(e) sets forth three requirements for an opposing affidavit: (1) personal knowledge; (2) admissibility; and (3) competency of the affiant.

A fair reading of Attorney Levin's "Affidavit" discloses that not a single one of these three requirements was met.

First, his "personal knowledge" can only be hearsay and opinion. Everything he allegedly learned in this case, he learned "since becoming attorney of record for plaintiff". This happened in March of 1965 (App. Op. Br. p. 6). IN other affidavits and from the first amended complaint itself, it clearly appears that all of the facts upon which appellant's case is based occurred on or before January 3, 1961, and certainly no later than April 30, 1961, approximately four years before Mr. Levin became an attorney in the case and before he examined any records. It is impossible to create "personal knowledge" in Mr. Levin as to any facts involved in this law suit. His review of records might, if he were qualified as an expert witness (which he is not), permit him to give his opinion as to the meaning or content of those records. No such qualifications appear in any of the pleadings or affidavits filed in this case.

Secondly, there are no facts set forth in Mr. Levin's affidavit which would be admissible in evidence. On the contrary, he purports to recite what transpired at a "number of sessions of the bankruptcy proceedings" before Referee Moriarty, without adding that he

only attended three or four sessions out of several dozen which took place. Furthermore, his recollection of what transpired is certainly not evidence, much less admissible evidence. Furthermore, such material as is set forth in Mr. Levin's affidavit, even if it is deemed to be evidence, is not relevant since it merely recites that Mr. Levin discovered facts in the course of an investigation. The date on which a substituted attorney discovers facts is certainly irrelevant when the issue before the court is when did the plaintiff discover the facts upon which his first amended complaint is based. Evidence must be relevant to be admissible.

Uniform Rule 7;

People v. Jones, 42 Cal. 2d 219, 222, 266 P. 2d 38.

In addition, there are policy reasons for excluding Mr. Levin's purported evidence, the most important of which are (1) undue prejudice, (2) unfair surprise, (3) confusion of issues, and (4) undue consumption of time.

See:

McCormick, pp. 314-319;
1 *Wigmore, Section 29a;*
Witkin, Calif. Evidence, p. 134.

Obviously, it is highly prejudicial to appellee to be confronted with a statement by a substituted attorney, who was brought into the case almost two years after it was originally instituted against another defendant, and almost one year after it was instituted against appellee, where the thrust of the new attorney's affidavit is that *he* didn't discover the facts upon which the original and first amended complaint (prepared by a predecessor attorney) were based until after the new

attorney had been substituted in. Certainly, such whimsical "discovery" should not be the basis of denying a motion for summary judgment. Likewise, unfair surprise would be sanctioned if an attorney or a substituted attorney could prevent the disposition of a case in a summary judgment proceeding based on statute of limitations, by the mere allegation that the attorney didn't discover the facts until after the complaint on which the facts were based had been filed and responsive pleadings thereto had been filed. Surely, no attorney going into a trial knows each and every fact which is going to develop during the course of that trial. If, after a law suit had been tried, the attorney could reopen the case and overcome the argument of statute of limitations by merely stating that he had "discovered" a new fact during the course of the trial which he did not have at his disposal at the time the complaint was drafted, the pleadings framed, and previous discovery taken, the statute of limitations could be effectively removed from the law, and the courts would be burdened forever with stale claims.

The purpose of a motion for summary judgment is to accord expeditious justice and to break log-jams in conjested court dockets.

> 3 *Barron & Holtzoff,* Fed. Pract. & Proc., p. 96.

Mr. Levin's affidavit, if considered relevant, certainly confuses the issues and calls upon the court to consume an undue amount of time. All of these reasons militate against the admissibility of such documents.

Finally, the Federal rule clearly requires that the affidavit "show affirmatively that the affiant is competent to testify to the matters stated therein." No-

where is such an affirmative showing set forth in the affidavit. Indeed, no such showing could be set forth in good faith by Mr. Levin since his competency to testify to matters which transpired some four years before he ever learned anything about the case would be nil.

The same rules prevent the admission of any of the other affidavits furnished on behalf of appellant, which make up a part of this record. It is interesting to note that appellant himself never has filed a single affidavit.

For the reasons hereinabove set forth, the affidavit of Richard H. Levin, if it can in any way be construed as constituting an attempt to extend or toll the statute of limitations, should be rejected and disregarded because of its obvious failure to meet the requirements of Rule 56(e).

III.

The First Amended Complaint Shows on Its Face That the Statute of Limitations Expired Before It Was Filed.

The accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief (*Connelly v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)) precludes dismissal for insufficiency of the complaint except in the extraordinary case where the pleader makes allegations which show on the face of the complaint some insuperable bar to relief.

Wright, Fed. Courts, 250 (1963);

Corsican Productions v. Pitchess, 388 F. 2d 441, 442-443.

The motion to dismiss should be determined upon allegations of the complaint and undisputed facts as they appear from pleadings, orders, and records of the case. The court must enter judgment forthwith if it appears that the moving party is entitled to a judgment as a matter of law.

Vol. IA Barron & Holtzoff, Fed. Pract. & Proc. Sec. 356, p. 369.

It clearly appears from the first amended complaint that it was filed on May 12, 1964. This is the filing stamp affixed in the upper right hand corner. It also clearly appears from the first amended complaint that the alleged fraud occurred between September 1, 1960, and January 3, 1961. There is no allegation anywhere in the complaint as to when plaintiff-appellant discovered the falsity of the misrepresentations or the facts which were concealed. There is no allegation that the concealment or misrepresentation continued after January 3, 1961.

The three-year statute of limitations, which is the longest possible statute of limitations applicable to any of the causes of action, is a matter of law. The very debenture which Turner claims he was fraudulently induced to buy, contains numerous references to the other documentation and agreements that preceded it, all of which would put any reasonably prudent man on notice of the very things of which Turner was complaining.

Therefore, as a matter of law, the first amended complaint shows on its face that the statute of limitations expired before the first amended complaint was filed. Therefore a motion to dismiss was proper and the judgment granting said motion should be affirmed.

The cases cited by appellant in support of the proposition that appellant should have been given an opportunity to remove any technical defect do not apply to the instant case and are not authority to support a reversal. The first case cited by appellant, *United States v. Thurston County, Nebraska,* 54 F. Supp. 201, is authority for the proposition that in ruling on a motion to dismiss, doubt should ordinarily be resolved against the motion; whereas, upon a trial on the merits, doubt usually inclines the scale adversely to him who has the burden of proof. That case did not involve the statute of limitations, Rather, it involved an effort by the United States, as plaintiff, to obtain a judgment on the merits predicated on the fact that the defendant's motion to dismiss had been denied.

In the case of *John Walker & Sons v. Tampa Cigar Company,* 197 F. 2d 72, cited by appellant, which was an action for infringement of trademarks, the District Court dismissed the complaint and the Appellate Court held that the complaint presented a factual issue as to whether or not the defendant's use of the name "Johnny Walker" in connection with its sale of cigars was likely to cause confusion or mistake or to deceive purchasers. The case did not involve the statute of limitations nor did it appear to a certainty from the complaint in that case that the plaintiff could not state a cause of action.

Both the cases of *Black v. First Natl. Bank of Mobile, Alabama,* 255 F. 2d 373, and *Negler v. Admiral Corporation,* 248 F. 2d 319, involved dismissals not going to the merits and the District Court's dismissal in both cases were reversed. Of course, it is the policy of the Federal Courts, pursuant to the Federal

Rules, not to dismiss a complaint that meets the pleading requirements of briefness and clarity. However, where the complaint affirmatively discloses the defect going to the merits of the case, and therefore shows that a cause of action cannot be stated, an order dismissing the complaint is proper and the moving party is entitled to a judgment as a matter of law.

Sheaf v. Minn. St. Paul & S.S.M.R. Rail Co., CCA N.D. 1947, 162 F. 2d 110.

Under Rule 12, a complaint may be dismissed on motion if clearly without any merit, and this want of merit may consist in an absence of law to support a claim of the sort made, or facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.

DeLoach v. Crowley's, Inc., CCA 5th 1942, 128 F. 2d 378.

Generally, where a complaint alleges facts constituting a claim for relief, and also alleges facts which constitute a valid defense, unless it alleges further facts avoiding such defense it may be attacked by demurrer or motion to dismiss.

Leggett v. Montgomery Ward Co. (C.A. 10th, 1949), 178 F. 2d 436, at p. 439.

The action should be dismissed when the complaint, on its face, shows the bar of limitations.

Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated Limited (1950 C.A. 9th Cal.), 185 F. 2d 196, cert. den. 340 U.S. 943, 95 L. Ed. 680, 71 S. Ct. 506, reh. den. 341 U.S. 912, 95 L. Ed. 1349, 71 S. Ct. 620.

See also:

61 A.L.R. 2d 321, et seq.;

Wright v. Bankers Service Corp. (D.C. Cal. 1941), 39 F. Supp. 980 app. dism.;

Wright v. Gibson, 128 F. 2d 865, holding motion to was proper.

IV.

The Denial, Without Prejudice, by Judge Solomon of the Earlier Motions to Dismiss and for Summary Judgment Did Not Prevent Those Motions From Later Being Raised.

Plaintiff cites the case of *Commercial Union of South America, Inc. v. Anglo-South American Bank,* 10 F. 2d 937, in support of his contention that the denial by Judge Solomon of the motion to dismiss constituted the law of the case and bound Judge Westover so as to preclude Judge Westover from ruling on that motion when it was renewed. The *Commercial Union* case, *supra,* was decided before *Erie v. Tompkins* and did not involve a situation at all similar to the instant case where Judge Solomon in his Memorandum Opinion of June 9, 1965, carefully indicated that the denial of the motion was without prejudice and could be renewed after the pre-trial order was filed [Tr. 321-322]. Had Judge Mack, in making his original decision in the *Commercial Union* case, *supra,* added the proviso set forth by Judge Solomon entitling the defendant to renew his motion after the pre-trial order clearly the decision of the Court of Appeals in the *Commercial Union* case would have been different.

Moreover, appellant Turner completely overlooks the fact that the obvious purpose of Judge Solomon's reser-

vation of the court's right to rehear the motions was an open invitation to Turner to contradict the matters asserted by Lundquist in his affidavits [Tr. 321]. Such contradiction was never forthcoming from appellant, unless we consider the "affidavit" of Mr. Levin, which for reasons stated above should be disregarded.

Accordingly, and in view of the express reservation of the court to rehear the matter on motion, the ruling of Judge Solomon did not becomes *res judicata* on the question of whether defendant-appellee was entitled to judgment.

Conclusion.

An examination of the conclusions set forth in Appellant's Opening Brief shows that they are without merit.

The supposed agency relationship (App. Op. Br. p. 30) must of necessity have been merely a relationship existing between USCM as principal and Roland and Lundquist as its agents. Since plaintiff did not see fit to join USCM as a party, and did not allege that Roland was Lundquist's agent or that Lundquist was Roland's agent, nor did appellant state in his pleading any reason for not joining USCM, no agency relationship was alleged.

Rule 19(c), F.R.C.P.

On pages 31 and 32 of his Opening Brief, appellant admits that discovery had been completed and the proposed exhibits had been filed. This alone would furnish the basis for reopening the motion in accordance with the suggestion of Judge Solomon, since the exhibits *proposed to be offered by plaintiff-appellant*

[Tr. 284-290] include the agreement dated as of December 1, 1960 [Tr. 187], the 6% note [Tr. 203], the December 1, 1960 letter [Tr. 206], the August 17, 1960 letter [Tr. 208], the financial statement for the period ending September 30, 1960 [Tr. 209], the letter of December 21, 1960 [Tr. 212], the annual report for the fiscal year ended January 31, 1961 [Tr. 285], all of which clearly show that Turner had knowledge, sufficient to put a reasonable man on inquiry, as to each of the alleged misrepresentations and omissions, well prior to three years in advance of the date he sued Lundquist. Thus, rather than contradicting Lundquist's affidavits, Turner confirmed them.

On page 32 of his Opening Brief, appellant, apparently through the ignorance of his counsel, mis-states the record by suggesting that defendant Lundquist should have opposed appellant's original motion to add Lundquist as a defendant, and that the trial court thereupon might have denied Turner's application to add Lundquist as a party. Appellant overlooks the facts that this motion was *ex parte* insofar as Lundquist was concerned, and Lundquist was not even served until July 14, 1964.

Appellant has had his day in court. In fact, he has had several days in court. In an effort to generate a case where none exists, he has made allegations of fraud and omission which would require weeks if not months of testimony, including the testimony of accountants and other experts, to refute. Appellant's entire case is based on his ignorance of facts, all of which were clearly spelled out in the documentation furnished as part of the debenture transaction, receipt of which he acknowledges in the pretrial statement.

It is hard to see a case that more clearly lends itself to speedy disposition by the summary judgment procedure than the present one.

Appellee respectfully urges this court to confirm the judgment of the District Court in granting the motion for summary judgment and the motion to dismiss.

Respectfully submitted,

HURLEY & DRISCOLL,
By ROBERT W. DRISCOLL,
Attorneys for Defendant-Appellee.